RECORD
AND
BRIEFS

No. 10-1491

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, et al.,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., et al.,

Respondents,

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF THE PETITIONERS

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June 13, 2012

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QUESTIONS PRESENTED

In granting *certiorari,* the initial questions before the Court were as follows:

> 1. Whether the issue of corporate liability under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, is a merits question or a question of subject-matter jurisdiction.
>
> 2. Whether a corporation can be held liable in a federal common law action brought under the ATS.

Following the February 28, 2012 oral argument, on March 5, 2012, this Court ordered supplemental argument on the following question:

> Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.

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INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York (the "Association") was founded in 1870 and has been dedicated since that date to maintaining the highest ethical standards of the profession, promoting reform of the law, and providing service to the profession and the public. With its 23,000 members, the Association is among the nation's oldest and largest bar associations. This *Amicus Curiae* Brief is respectfully submitted on behalf of the Association pursuant to Supreme Court Rule 37 in support of the Petitioners.[1] All parties have consented to the filing of this brief.[2]

The Association's enduring commitment to the protection and promotion of human rights, the rule of law, and the fair administration of justice is reflected in the efforts of its many standing committees, including its Committee on International Human Rights. This case is of compelling interest to our Association[3] and to our

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[1] Pursuant to Rule 37(6), the Association affirms that no counsel for a party authored the brief in whole or in part and no person other than the Association or its counsel made a monetary contribution to this brief.

[2] Consent letters have been filed with the Court by the parties.

[3] In March 2004, the Association's Committee on International Human Rights issued a detailed report on the origins, purpose, and interpretations of the Alien Tort Statute. *See* "Causes of Action under the Alien Tort Statute," International Human Rights Committee, The Association of the Bar of the City of New York (March 2004), available at http://www.nycbar.org/pdf/report/ATS%20Draft%207A%20Clean.pdf.

nation's commitment to the rule of law. It is essential to preserve the ability of U.S. federal courts to remedy the most brutal violations of international law, in this case alleged torture, extrajudicial executions, and crimes against humanity, in which the Respondents allegedly participated. Such violations of the law of nations require domestic remedies for victims that extend to all parties responsible for such conduct.

The decision below, *Kiobel v. Royal Dutch Petroleum Co.,* 621 F.3d 111 (2d Cir. 2010), exempted one class of defendants, corporations, from civil liability under federal common law even if their actions violate universally accepted norms of conduct. This issue has been thoroughly briefed by the parties and numerous *amici curiae,* including the United States Department of Justice, and argued before the Court on February 28, 2012.

The Association now submits this brief, as a friend of the Court, in support of the Petitioners on the issue specified by the Court for supplemental argument on the application of the Alien Tort Statute to acts occurring in foreign jurisdictions. In doing so, the Association urges this Court to reverse, or vacate, the decision of the U.S. Court of Appeals for the Second Circuit, and to remand this case for adjudication in accordance with this Court's established and appropriate standards set forth in *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004).

SUMMARY OF ARGUMENT

The Alien Tort Statute, 28 U.S.C. §1350 ("ATS"),[4] grants federal court jurisdiction over a violation of the law of nations or a U.S. treaty, where the former is consistent with the standards this Court set forth in *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004). The plain language, legislative history, and context of the ATS clearly indicate that the ATS was intended to apply to acts committed abroad, overriding any "presumption against extraterritoriality." This intention of the First Congress is consistent with over 30 years of ATS jurisprudence involving acts abroad, as reflected in *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980), the numerous ATS cases that have followed *Filartiga*, this Court's holding in *Sosa*, and the legislative history of the Torture Victim Protection Act, 28 U.S.C. §1350(2)(a) ("TVPA").

As this Court held in *Sosa,* ATS jurisdiction is proper when the alleged act violates a customary international law norm that is specific, obligatory, and universal and thus is actionable under that statute regardless of where the conduct in question occurs. As in other federal cases, federal courts may only adjudicate a claim when they properly exercise both subject matter jurisdiction and *in personam* jurisdiction over a defendant based on

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[4] 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States.").

that defendant's presence in or contacts with the U.S. state in which the district court is located.

Federal courts may properly decline to exercise their jurisdiction when, under the doctrine of *forum non conveniens*, another forum offers a more appropriate venue for the plaintiff's claims, including courts of another nation. Similarly, federal courts may also decline to exercise jurisdiction when the U.S. Department of State certifies that entertaining the plaintiff's ATS claim could harm U.S. relations with a foreign nation or impede the Executive Branch's ability to carry out foreign affairs.

Even with these caveats, the ATS serves an important function in providing redress to victims and civil accountability for serious human rights abuses, and its application should not now be truncated by the Court when Congress has declined to do so during the more than 30 years since the *Filartiga* decision. As this Court recognized in *Sosa*, the ATS denies refuge from civil liability in the U.S. to those who commit egregious violations of the law of nations, especially when victims have no other civil remedy for those violations.

Federal court jurisdiction of ATS claims for gross misconduct abroad also furthers the development of fair and consistent standards for liability for conduct that violates the law of nations. Such standards better serve the interests of the United States and its nationals than a patchwork of varying foreign court decisions, many of which would be entitled to recognition and enforcement in the U.S. Such an outcome would not reflect the intention of the First Congress, the rigor of this Court's *Sosa* standards, or the independence of U.S.

courts in interpreting and applying the law of nations.

The decision of the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), should be reversed, or vacated, and the case remanded for adjudication in accordance with the standards set forth by this Court in *Sosa*.

ARGUMENT

I. THE ALIEN TORT STATUTE ("ATS") GRANTS FEDERAL COURTS JURISDICTION OVER CIVIL CLAIMS FOR VIOLATIONS OF THE LAW OF NATIONS OCCURRING WITHIN THE TERRITORY OF A SOVEREIGN OTHER THAN THE UNITED STATES

Both before and after the Second Circuit's *Kiobel* decision, federal courts (including the Second Circuit), have uniformly applied the ATS to acts occurring abroad, including those involving foreign defendants over whom the courts have jurisdiction based on their U.S. presence or contacts.[5] The appropriateness of this application

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[5] *See generally Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (ATS claim by a Paraguayan plaintiff against a Paraguayan defendant for the torture and death of a third Paraguayan citizen in Paraguay); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (ATS claim by Mexican plaintiff against Mexican defendant for acts occurring in Mexico); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (ATS claim by Nigerian plaintiffs against holding companies incorporated in the Netherlands and the United Kingdom for acts of their Nigerian subsidiary in Nigeria); *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011) (ATS claim by Argentinian plaintiffs against German corporation for acts in Argentina); *Liu Bo Shan v. China Const. Bank Corp.*, 421 Fed.Appx. 89 (2d Cir. 2011) (no objection by defendant or Second Circuit to jurisdiction for extraterritorial act in China; dismissed on other grounds); *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 672 F.3d 155 (2d Cir. 2012) (no objection by defendant or Second Circuit to jurisdiction for extraterritorial harm in Israel, even when analyzing choice of law concerns). *See Filartiga*, 630 F.2d at 885 ("Common law

of the ATS derives from the purpose and plain language of the statute itself. The circumstances under which the ATS has been applied, and should continue to be applied, require the plaintiff to satisfy, with specific factual allegations, the requirements set forth in *Sosa* and for the federal court to have personal jurisdiction over a defendant, as is required for all transnational federal actions.

Even if a federal court has both subject matter and personal jurisdiction in an ATS case, it may still consider whether to exercise its jurisdiction under the *forum non conveniens*, "political question," or other doctrines. These limitations over a court's power to adjudicate ATS actions, applied on a case-by-case basis to specific facts and circumstances, are more appropriate than a blanket, one-size-fits-all approach to ATS claims. The potential need for such an inquiry by the court does not, however, destroy its jurisdiction under the ATS, but rather may result in dismissal, transfer of venue, or a narrowing of claims before the court.[6]

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courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over who they exercise personal jurisdiction, wherever the tort occurred. . . . It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction.").

[6] *See, e.g., Filartiga*, 630 F.2d at 889 n.25 ("Such a decision [to apply a choice of law analysis] would not retroactively oust the federal court of subject matter jurisdiction. . . .").

A. The Plain Language of the ATS Allows for Extraterritorial Application of the Statute, Which is Not Precluded by Any "Presumption Against Extraterritoriality"

In *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991), this Court recognized that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States".[7] Where the territorial scope of a statute is at question, the Court's role is to "determine whether Congress intended" to exercise that authority via analysis of statutory construction of the statute at hand. *Id.* at 248. As this Court also held in *Morrison v. National Australia Bank Ltd.*, __ U.S. __, 130 S.Ct. 2869, 2877 (2010), although there is a "perception that Congress ordinarily legislates with respect to domestic, not foreign matters," if there is an "affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect," this will overcome any "presumption against extraterritoriality." *Id.* (internal quotation marks and citations omitted). It is not required that a statute expressly state: "this law applies abroad;" to the contrary, its legislative history and "[a]ssuredly context can be consulted as well." *Id.* at 2883.

The plain language of the ATS overrides any applicable presumption against its extraterritorial

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[7] *Id.* citing *Cf. Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949), *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

application by discussing torts "in violation of the law of nations or a treaty of the United States[,]" which directly implicates acts traditionally outside the realm of domestic law.[8] The fact that the subject of the statute is an "alien" invoking international law further supports Congress' intent to provide a civil remedy for extraterritorial acts, because aliens are likely to have interactions outside of the U.S. that may give rise to an international law claim.

The applicable law at the time the ATS was passed, as stated by this Court in *Sosa*[9] when quoting the English jurist, Sir William Blackstone, also supports a "clear intention" for the ATS to include acts abroad. Congress did not intend for ATS claims to be limited to those arising on the high seas or outside of any sovereign nation's jurisdiction. Pirates, after all, also carried out their crimes in the territorial seas of other nations.[10]

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[8] 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States.").

[9] *See Sosa*, 542 U.S. at 715 ("To Blackstone, the law of nations in this sense was implicated 'in mercantile questions . . . . [and t]he law merchant emerged from the customary practices of international traders and admiralty required its own transnational regulation. . . . [Also,] Blackstone referred . . . three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy.' 4 Commentaries 68.").

[10] *Sosa*, 542 U.S. at 738 (discussing opinion of U.S. Attorney General, William Bradford, which addressed the applicability

Moreover, once the "presumption against extraterritoriality" has been overcome, there is no further presumption limiting where a statute is to apply abroad, unless clearly delimited by Congress.

1. *Sosa* Acknowledged that Congress Intended Federal Courts to Have Jurisdiction in ATS Cases Involving Extraterritorial Acts by Aliens against Aliens, as in *Filartiga* and Its Progeny

In upholding federal court jurisdiction over ATS claims in *Sosa,* this Court acknowledged that "[t]he position we take today has been assumed by some federal courts for 24 years [(now, 32 years)], ever since the Second Circuit decided *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980)." *Sosa,* 542 U.S. 632, 730-31 (2004).

The *Sosa* Court also acknowledged that the House Report issued when Congress passed the TVPA in 1991 provided clear congressional support for *Filartiga* and its progeny, which included numerous cases involving application of the ATS to acts taking place in territories of a foreign sovereign. *Id.* at 34 ("Congress, however, has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting

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of civil tort remedy under the ATS to a violation of the law of nations involving "plunder of a British slave colony in Sierra Leone" within British territory, citing Breach of Neutrality, 1 Op. Att'y Gen. 57 (1795).

legislation [(the TVPA)] supplementing the judicial determination in some detail."). *Id.* at 728 (citing the House Report issued during the passage of the TVPA).[11] Further, as recognized by this Court in *Sosa*, since the ATS' enactment in 1789, "Congress has not in any relevant way amended [the ATS] or limited civil common law power by another statute." *Sosa,* 542 U.S. at 724–25. Also recognized in *Sosa,* it has been the law of every federal jurisdiction for the past 30 years to apply the ATS to extraterritorial acts occurring in a foreign sovereign's territory regardless of their location and regardless of the citizenship of the defendant. *Id.* at 730-31.

Sosa instructs federal courts to exercise "caution" in construing the substantive causes of

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[11] H.R. Rep. 102-367(I), 102nd Cong., 1992 U.S.C.C.A.N. 84, 1991 WL 255964, "Torture Victim Protection Act of 1991 Dates of Consideration and Passage," Nov. 25, 1991 ("The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, [the ATS], which [. . .] has other important uses and should not be replaced. . . . In the case of *Filartiga v. Pena-Irala,* the Second Circuit Court of Appeals recognized a right of action against foreign torturers under the [ATS]. . . . The *Filartiga* case met with general approval. [. . .] In *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774 (D.C.C. 1984), *cert. denied* 470 U.S. 103 (1985), a case involving [. . . acts in the territory of a foreign sovereign], Judge Bork questioned the existence of a private right of action under the [ATS], reasoning that separation of powers principles required an explicit–and preferably contemporary–grant by Congress of a private right of action before U.S. courts could consider cases likely to impact on U.S. foreign relations. The TVPA would provide such a grant.").

action under the ATS and has provided narrow parameters for doing so. Starting with *Filartiga*, federal courts continue to apply the ATS only to defendants over which personal jurisdiction exists. Further, federal courts routinely apply well-established doctrines addressing concerns over venue, comity, foreign affairs, and the like to the specific facts and circumstances of a given case.

B. ATS Jurisdiction is Proper When the Alleged Act Meets the Substantive Requirements of *Sosa* and When the Court Properly Exercises *In Personam* Jurisdiction over the Defendant

As prescribed by this Court in *Sosa*, federal courts are to look to international law to define conduct[12] that is actionable under the ATS because the ATS is, by its terms, limited to violations of the law of nations and treaties of the U.S. As *Sosa* emphasizes, the remedy available under the ATS is supplied and limited by federal law.[13] In addition,

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[12] The *Sosa* Court clarified the scope of the ATS and construed it as a jurisdictional grant for claims alleging a violation of the law of nations, while recognizing that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations." *Sosa*, 542 U.S. at 730.

[13] *Sosa*, 542 U.S. at 712 ("jurisdiction enabled the federal courts to hear claims . . . defined by the law of nations and recognized at common law"). *See also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 788 (D.D.C. 1984) (Edwards, J., concurring) ("international law establishes [basic parameters] for a domestic court's exercise of jurisdiction over extraterritorial activities. *See* Restatement of the Law of

federal courts must also properly exercise personal jurisdiction over a defendant based upon traditional and well-established notions of presence, domicile, consent, or sufficient minimum contacts with the forum state.[14] Other concerns regarding venue, comity, foreign affairs, and the like, are also concerns for federal courts after proper subject matter and personal jurisdiction have been established.[15]

U.S. federal courts have extensive experience over the past 30 years applying personal

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Foreign Relations (Revised) §§ 402-404 (Tent. Draft No. 2, 1981) (enumerating permissible bases of "jurisdiction to prescribe," applicable both to criminal and civil law")).

[14] *See International Shoe Co. v. Washington,* 326 U.S. 310, 320 (1945) (federal personal jurisdiction is proper over corporate defendants not domiciled in the forum state when sufficient contacts exist consistent with the "traditional conception of fair play and substantial justice" embodied in the Due Process Clause of the Fourteenth Amendment). Continuous and systematic contacts provide for "general jurisdiction" and minimal contacts directly related to the cause of action provide for "specific jurisdiction." *Id. See also,* S. Rep. No. 102-249(II), 102nd Cong., 1st Sess. 1991, 1991 WL 258662, Nov. 26, 1991 (or TVPA "Senate Committee Report") (In detailing "Who can be sued" under the TVPA, the sister statute to the ATS promulgated under the same chapter and section of the U.S. Code, the Senate Committee recognized that "defendants over which a court in the United States has personal jurisdiction may be sued" *Id.* at 7, 7 n.11 (citing *International Shoe Co. v. Washington,* 326 U.S. 310 (1945))).

[15] *See Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 788 (D.D.C. 1984) (Edwards, J., concurring) ("municipal law doctrines pertaining to a court's exercise of jurisdiction, such as *forum non conveniens* and attainment of personal jurisdiction, must be met").

jurisdiction standards in ATS litigation.[16] Further, foreign defendants, have been subject to the same standards in the litigation of transitory torts for even longer.[17] Notably, adjudicating egregious

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[16] *See generally Filartiga*, 630 F.2d at 885 (jurisdiction over Paraguayan defendant based on presence in forum state); *Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 1988) (for acts occurring in Saudi Arabia, court analyzed personal jurisdiction of foreign corporate defendants and held they were not "doing business" in Texas to support jurisdiction); *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 672 F.3d 155 (2d Cir. 2012) (discussing proper jurisdiction considerations for foreign bank defendant and certifying to high court of New York State the question of whether bank's maintenance and use of account in New York for wire transfers to alleged terrorist satisfies contact requirements for personal jurisdiction. *See Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50 (2d Cir. 2012)).

[17] *See generally Dennick v. Cent. R.R. Co. of New Jersey*, 103 U.S. 11 (1880) ("In the jurisprudence of England, transitory actions at common law were entertained against, and at the suit of, any British subject or alien friend, wherever the cause of action really arose, if process might be served upon the defendant. . . . It is no objection that all the parties to the suit are aliens or non-residents, and that the cause of action arose abroad." (omitting internal citations)); *Clews v. Woodstock Iron Co.*, 44 F. 31 (S.D.N.Y. 1890) (Alabama corporate defendant not doing business in New York to equate presence merely because its bonds were listed on the New York Stock Exchange); *St. Louis Southwestern Ry. Co. of Texas v. Alexander*, 227 U.S. 218 (1913) ("as to the presence of the corporation within the jurisdiction of the court in which it was sued [. . . .] A long line of decisions in this court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof."); *Perkins v. Benguet Consolidated Mining Co.*, 342

violations of the law of nations, which are universally abhorrent, should be less offensive to international comity than applying the intricacies of federal law against foreign defendants where there is no equivalent law in their home states, as often occurs with transitory torts and other federal statutes.

In considering the circumstances over which the ATS should apply extraterritorially, the need for both subject matter jurisdiction and personal jurisdiction over defendants in ATS cases is consistent with precedent under *Sosa* and *Filartiga*. This also sufficiently comports with "traditional conceptions of fair play and substantial justice"

U.S. 437 (1952) (finding jurisdiction over foreign corporation where corporate officer had meaningful contacts that equated with "doing business in" the forum state); *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 417 (1984) (finding no jurisdiction over foreign corporation for helicopter crash in Peru killing U.S. citizens due to defendant's lack of continuous and systematic contacts in forum state); *Celi v. Canadian Occidental Petroleum Ltd.*, 804 F. Supp. 465 (E.D.N.Y. 1992) (Canadian corporate defendant not doing business in New York by merely selling stock on the New York Stock Exchange). *See also Licci ex rel. Licci v. Lebanese Canadian Bank, SAL,* 672 F.3d 155 (2d Cir. 2012) (discussing at length proper jurisdiction considerations for foreign bank defendant and certifying to New York State Court of Appeals the question of whether bank's maintenance and use of account in New York for wire transfers to alleged terrorist satisfies contact requirements for personal jurisdiction. *See Licci ex rel. Licci v. Lebanese Canadian Bank, SAL,* 673 F.3d 50 (2d Cir. 2012)). *Cf. Stone v. U.S.,* 167 U.S. 178, 182 (1897) (unlike trespass upon land, a claim "of a transitory nature[. . .] could be brought in any jurisdiction in which the defendant could be found and served with process").

embodied in the Due Process Clause of the Fourteenth Amendment. *See International Shoe,* 326 U.S. at 320.[18]

1. Judicial Concerns Regarding Venue and Foreign Affairs Do Not Warrant Nullifying ATS Jurisdiction Conferred by Congress

Judicial concerns regarding hypothetical issues that might arise in any given ATS case (standing, venue, foreign affairs, comity, choice of law, justiciability, and the political question doctrine) do

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[18] *See also Filartiga,* 630 F.2d at 878-79 (district court properly exercised *in personam* jurisdiction over defendant based on physical presence in the forum state, where defendant was a natural person physically residing in the U.S. for more than nine months when properly served with a complaint).

In *Wiwa v. Royal Dutch Petroleum Co.,* 226 F.3d 88 (2d Cir. 2000), a sister litigation to *Kiobel* involving the same defendants, forum, and operative facts for the purpose of jurisdiction, the Second Circuit held that the district court properly exercised personal jurisdiction over the *Kiobel* defendants. *Id.* In applying FED. R. CIV. P. 4(k)(1)(a), the Second Circuit held that the defendants' purposeful contacts with the forum state of New York "were sufficient to constitute 'doing business' in New York, as required to establish general jurisdiction under N.Y. C.P.L.R. § 301" in the United States District Court for the Southern District of New York. *Wiwa,* 226 F.3d at 94. Consistent with *International Shoe,* general jurisdiction over the *Kiobel* defendants comports with the "traditional conception of fair play and substantial justice". *See International Shoe,* 326 U.S. at 320.

not invalidate ATS jurisdiction and do not warrant eviscerating the ATS. This is especially the case because federal courts are well equipped to and highly experienced in addressing such concerns in ATS actions,[19] as well as other claims involving transitory torts and other federal law.[20]

In *Sosa*, this Court called attention to the special role that federal courts play in considering issues relevant to claims occurring in the territory of another sovereign, including venue, comity, and foreign affairs.[21] These same issues have been

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[19] *See generally Filartiga v. Pena-Irala*, 630 F.2d 876, 889-90 (2d Cir. 1980) (acknowledging district court's ability to analyze choice of law concerns and *forum non conveniens* factors); *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 862 (E.D.N.Y. 1984) (applying doctrines of *forum non conveniens* and Act of State on remand from Second Circuit); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 789 (D.D.C. 1984) (Edwards, J., concurring) (discussing Act of State doctrine); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (applying political question and Act of State doctrines); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (applying political question doctrine); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (holding that venue was proper); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 99-107 (2d Cir. 2000) (holding that *forum non conveniens* grounds did not require dismissal of action).

[20] *See generally Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (applying doctrine of *forum non conveniens*); *Koster v. American Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947) (same); *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 672 F.3d 155 (2d Cir. 2012) (analyzing choice of law concerns).

[21] *See Sosa*, 542 U.S. at 733 n.21 (discussing the discretionary limitations to be applied by federal courts, including whether a specific case unduly impinges on the role of the executive in

successfully addressed by federal courts over the past thirty years in ATS litigation, beginning with *Filartiga*,[22] and do not in our view present a valid reason for this Court, or any other court, to eviscerate the ATS by effectively limiting its application to the high seas, Antarctica, and the United States itself.

In *Filartiga,* the defendant filed a motion to dismiss based on subject matter jurisdiction and *forum non conveniens*, arguing that a court in Paraguay would be a more appropriate venue to adjudicate the suit. *Filartiga,* 630 F.2d at 879-880. The district court dismissed the action for a lack of subject matter jurisdiction alone, never addressing the issue of *forum non conveniens. Id.* In reversing that dismissal and finding subject matter jurisdiction, the Second Circuit instructed the district court to *inter alia* consider the

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the conduct of U.S. foreign policy and is therefore a "political question"). Notably, the Court's discussion of the possible foreign policy implications of cases pending against a variety of defendants for acts allegedly occurring within the territory of a foreign sovereign did not even suggest that these circumstances made the plaintiffs' ATS claims jurisdictionally defective. *See id.*

[22] *See Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). *See also Al Shimari v. CACI Int'l, Inc.*, __ F.3d __, 2012 WL 1656773 *4 (4th Cir. 2012) (upholding district court dismissal of ATS claim for acts occurring in Iraq based on political question doctrine); *Bigio v. Coca-Cola Co.*, 675 F.3d 163 (2d Cir. 2012) (dismissing ATS claims for acts in Egypt based on Act of State doctrine); *S.K. Innovation, Inc. v. Finpol*, __ F. Supp. 2d __, 2012 WL 1259108 (D.D.C. 2012) (dismissing ATS claim against agencies of the Republic of Kazakhstan for acts in Kazkhstan based on Foreign Sovereign Immunities Act).

appropriateness of the venue based on *forum non conveniens* factors. *Filartiga,* 630 F.2d at 889-90. On remand, the district court weighed not only *forum non conveniens* factors, but also considered whether the suit was barred by the Act of State doctrine. *Filartiga v. Pena-Irala,* 577 F. Supp. 860, 862 (E.D.N.Y. 1984).

In *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 789 (D.D.C. 1984) (Edwards, J., concurring), in a concurring opinion, Judge Edwards aptly stated as follows:

> It simply is not the role of a judge to construe a statutory clause out of existence merely on the belief that Congress was ill-advised in passing the statute. If Congress determined that aliens should be permitted to bring actions in federal courts, only Congress is authorized to decide that those actions "exacerbate tensions" and should not be heard.

Id. Judge Edwards went further and specifically rejected the desire of some judges to artificially narrow ATS jurisdiction due to personal concerns about the statute's wisdom.[23]

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[23] *Id.* at 790 ("to construe it out of existence on that ground is to usurp Congress' role and contravene its will"). *Id.* at 789 ("The [Act of State] doctrine does *not* require courts to decline jurisdiction, as does the Foreign Sovereign Immunities Act, but only not to reach the merits of certain issues." (emphasis in original)).

In fact, in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 99-107 (2d Cir. 2000), a predecessor case involving the same forum, relevant facts, and defendants in *Kiobel*, the district court dismissed the complaint on *forum non conveniens* grounds, a decision overturned by the Second Circuit following a reevaluation of the factors relevant to that doctrine. *Id.* As a result, judicial concerns of this kind are not appropriate considerations when considering the initial validity and jurisdictional reach of the ATS, but can properly be considered, and reevaluated upon appeal.

The ability of federal courts to aptly apply such doctrines in ATS actions is no surprise, as federal courts have been applying them for well over 100 years with the adjudication of transitory torts and other kinds of actions involving foreign activity.[24] Federal courts regularly hear tort claims involving conduct that is exclusively foreign while addressing, as needed, any fear that such suits raise venue, comity, or foreign policy concerns.

Where the Executive Branch determines that a particular ATS claim raises serious foreign policy concerns, the State Department can so advise the

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[24] *See Dennick v. Cent. R.R. Co. of New Jersey*, 103 U.S. 11 (1880) (discussing comity and choice of law in transitory tort action for wrongful death involving corporate defendant). *See also In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991) (finding jurisdiction over British reinsurers under the McCarran-Ferguson Act after analyzing relevant comity factors and despite *amicus curiae* submission requesting the contrary from the United Kingdom).

courts, as done with other federal claims.[25] Thus, there is no need, and no legal justification, for a blanket restriction on the territorial reach of the ATS. Such a restriction would overturn more than three decades of ATS jurisprudence developed since *Filartiga,* which was confirmed by this Court in *Sosa* and consciously left undisturbed by Congress.

II. By Providing Civil Redress to Victims and Accountability for Serious Human Rights Abuses, the ATS Serves an Important Function That Should Not Be Eviscerated by Artificial Limitations Imposed by this Court

Federal courts play a fundamental role in enforcing the handful of international norms that are cognizable under the ATS. *Sosa,* 542 U.S. at 730–31 ("The First Congress . . . assumed that federal courts could properly identify some international norms as enforceable in the exercise of [ATS] jurisdiction.").

Beginning in 1980 with *Filartiga,* litigation under the ATS has provided important redress to victims of egregious human rights abuses. These

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[25] *See Sosa* 543 U.S. at 733 ("there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy. *Cf. Republic of Austria v. Altmann,* 541 U.S. 677 (2004) (discussing the State Department's use of statements of interest in cases involving the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 et seq.)").

suits have involved claims of genocide, war crimes, torture and summary execution under color of law, crimes against humanity, nonconsensual medical experimentation, slavery, piracy, and apartheid. *E.g., Kadic v. Karadzic,* 70 F.3d 232, 240, 243 (2d Cir. 1995); *In re Ferdinand Marcos, Human Rights Litig.,* 25 F.3d 1467, 1475 (9th Cir. 1994); *Abdullahi v. Pfizer, Inc.,* 562 F.3d 163 (2d Cir. 2009), *cert. denied,* __ U.S. __, 130 S.Ct. 3541 (2010); *see Sosa,* 542 U.S. at 732, 737 (recognizing ATS jurisdiction for "a handful of heinous actions . . . as actionable violations of international law) (internal citations and punctuation omitted). These acts are so heinous that those who engage in such conduct are "—like the pirate and slave trader before him—*hostis humani generis,* an enemy of all mankind." *Sosa,* 542 U.S. at 732, (quoting *Filartiga,* 630 F.2d at 890).

Although Federal Courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations," *Sosa,* 542 U.S. at 728, their role in fashioning appropriate domestic remedies for such violations is central. As this Court noted in *Sosa*, "it would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals" where such norms have been recognized as definable, universal, and obligatory. *Id.* at 730, 732.

This Court recognized the remedial purpose of the ATS in *Sosa*, which is to provide a tort remedy

to victims of "a violation of the law of nations."[26] To limit the tort remedy of the ATS to exclude all territory under the control of other nations[27] would

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[26] *Sosa*, 542 U.S. at 738 (recognizing "a federal remedy" in tort for acts that violate a sufficiently defined "norm of customary international law"). *See id.* at 724 ("compensation to those injured through a civil suit, would have been familiar to the founding generation . . . a private remedy was thought necessary for [certain] offenses under the law of nations") (internal citations and punctuation omitted). *See also id.* at 720–21 (quoting favorably the 1795 opinion of Attorney General William Bradford, which discussed the tort remedy of the ATS as separate and not dependent upon criminal liability for "plunder of a British slave colony in Sierra Leone." 1 Op. Att'y Gen. 57 ("there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the Courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States") (emphasis in original)). Notably, this 1795 opinion interpreted the ATS to apply to cases occurring in Sierra Leone, the territory of a foreign sovereign, England, involving acts by the French fleet and American citizens. *Id.*

[27] Notably, the courts of other nations have adjudicated civil cases in tort for human rights abuses that occur extraterritorially. *See Kuwait Airways Corp. v Iraqi Airways Co.* [2002] UKHL 19, 10-11 [2002] (appeal taken from Eng.) (U.K.) (House of Lords in United Kingdom held that English court's had jurisdiction over a tort claim that occurred in Iraq by an alien plaintiff against an alien defendant despite defendant's *forum non conveniens* objections). *See also* BBC, *Dutch Court Compensates Palestinian for Libya Jail,* March 28, 2012, *available at* http://www.bbc.co.uk/news/world-middle-east-17537597 (discussing Dutch court civil verdict awarding 1.3 million Euros to Palestinian doctor suing Libyan officials in tort for torture and imprisonment for eight years in Libya). *See also* Anna Triponel, *Comparative*

effectively limit the ATS to acts committed on the high seas, in Antarctica or in the U.S. This would undermine the statute's remedial purpose of providing a civil tort remedy to redress conduct that is universally condemned as reprehensible.[28]

A. Federal Court Jurisdiction over ATS Claims Provides a Forum for Alien Victims Who Otherwise Have No Remedy for Egregious Violations of the Law of Nations

The U.S. has a strong interest in providing a federal forum to provide a civil remedy for plaintiffs injured through conduct by individuals or corporations who are present in the U.S., who have violated the universally recognized norms cognizable under the ATS, and who are not subject to suit in another more appropriate and impartial forum. Federal jurisdiction over ATS claims provides a forum for alien victims when the nation where the event occurred either does not possess an

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Corporate Responsibility in the United States and France for Human Rights Violations Abroad, in GLOBAL LABOR AND EMPLOYMENT LAW FOR THE PRACTICING LAWYER 65 (Andrew P. Morriss & Samuel Estreicher, eds., 2010) (discussing civil tort litigation in France against French corporations for alleged human rights violations occurring in Cameroon and Liberia).

[28] *See Ne. Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, 278–79 (1977) (rejecting "[a] theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts the coverage of a remedial Act . . .").

independent or impartial judiciary or is otherwise unable to provide a civil remedy for victims of gross violations of the law of nations.

In *Filartiga*, the Second Circuit recognized the importance to the United States of not providing refuge from liability to those who commit egregious human rights abuses in violation of the law of nations. To carve out exceptions to the territorial reach (or available defendants) under the ATS would limit the scope and benefits of this remedial statute in a way that was not intended by Congress, this Court in *Sosa,* or the majority of federal courts that have addressed these issues.

Despite over 30 years of litigation under the ATS that includes actions arising abroad, as well as 20 years of overlap with the TVPA, Congress has not felt the need to revise either statute. *Sosa,* 542 U.S. at 725. This Court should not now eviscerate a legal framework that has been affirmed by the three branches of government on numerous occasions. While some, including the defendants in this litigation, might welcome such a severe curtailment of the scope of the ATS, the price of that curtailment—apart from its repudiation of the Court's own precedent—would be high for both victims of egregious human rights abuses and for our nation's ability to provide a civil remedy against the abusers of human rights who are present in the United States and subject to the jurisdiction of our courts.

B. Federal Court Jurisdiction over ATS Claims for Gross Misconduct Abroad Furthers the Fair and Consistent Development of Liability Standards for Conduct that Violates the Law of Nations

Federal jurisdiction in ATS actions provides a competent and independent venue for the impartial adjudication of claims of injury from gross violations of international law by persons subject to the court's jurisdiction. That remedy is of immense value to the injured plaintiffs. Beyond that, however, the informed and consistent application of international standards by U.S. courts better serves U.S. interests and those of all parties, including U.S. businesses, seeking to conduct international trade in a manner that respects basic standards of civilized nations and establishes predictable norms for operating within the territory of foreign sovereigns.

Although the ATS grants federal courts jurisdiction over ATS suits, they are not the only venues available to foreign plaintiffs when suing either foreign or U.S. defendants for at least some violations of international law.[29] Particularly if our federal courts are unable to entertain damage

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[29] *See, e.g., Goodyear Dunlop Tires Operations, S.A. v. Brown*, __ U.S. __, 131 S.Ct. 2846 (2011) (Goodyear USA and its foreign subsidiaries sued in North Carolina State Court for wrongful death based on acts occurring in France; dismissed foreign subsidiaries for lack of personal jurisdiction due to insufficient contacts in forum state, yet jurisdiction proper for Goodyear USA).

claims against foreign violators of the law of nations, foreign tribunals (or U.S. state courts) may be asked to do so, often with far less competence, independence, or consistency.[30] The resulting judgments of such tribunals would frequently be entitled to full faith and credit in U.S. courts. In light of this, the Second Circuit noted in *Filartiga*, "the wisdom" of federal jurisdiction over ATS claims as follows:

> We note that the foreign relations implications of this and other issues the district court will be required to adjudicate on remand underscores the wisdom of the First Congress in vesting jurisdiction over such claims in the federal district courts through the [ATS]. Questions of this nature are fraught with implications for the nation as a whole, and therefore

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[30] See, for example, *Chevron Corp. v. Naranjo*, 667 F.3d 232, 236-38 (2d Cir. 2012), discussing the allegations by a U.S. defendant that an Ecuadorean judgment against it was the result of unethical influence, corruption, and fraud by the Ecuadorean plaintiffs' attorneys and the Ecuadorean Government. *Id.* (reversing U.S. district court's granting of global injunctive relief from enforcement of the Ecuadorean court's judgment). Early in this long-running, multi-jurisdictional litigation, defendant's predecessor had successfully petitioned for removal from U.S. federal court to the court in Ecuador based, *inter alia*, on grounds of *forum non conveniens* and international comity; defendant later returned to the same federal court to challenge the resulting Ecuadorean judgment. *Id.*

> should not be left to the potentially varying adjudications of the courts of the fifty states.

Filartiga, 630 F.2d at 890.

This reasoning is even more compelling in the context of litigation in global forums, rather than U.S. state courts, and is more directly relevant to today's transnational actors than it was in 1980. Restricting the availability of a federal forum for ATS claims would invite the development of an inconsistent and fragmented jurisprudence in an area of law where coherence and consistency is of paramount concern to U.S. courts, U.S. citizens travelling overseas, and U.S. firms operating abroad.

The first Congress recognized this U.S. interest in the consistent and fair application of international standards by our nation's federal courts, and subsequent Congresses have continued to support this vital federal judicial role. To retroactively repudiate that role now would, as discussed above, deprive injured plaintiffs of redress and reestablish our nation as a refuge for those who commit grave violations of the most fundamental human rights. Moreover, the standards that this Court promulgated in *Sosa* in 2004, and that the federal courts have carefully applied since that time, provide a framework for responsible conduct abroad by both U.S. and foreign nationals. Removing that role would inevitably accelerate the development of inconsistent, and perhaps overreaching, standards

for assessing liability for claimed violations of international law by both individual and corporate actors doing business or otherwise conducting operations in foreign jurisdictions. Any such reversal of long-standing U.S. law and policy should come, if at all, from Congress and not from this Court.

CONCLUSION

The ATS confers jurisdiction on the federal courts to adjudicate tort claims arising under the law of nations wherever the defendant's conduct occurs. Accordingly, the decision of the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.* should be reversed, or vacated, and the case remanded for adjudication in accordance with the standards set forth by this Court in *Sosa*.

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